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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DONTA LAMONT CAMPBELL, Defendant and Appellant.	G047708 (Super. Ct. No. 12WF0369) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance Jensen, Judge. Affirmed.

Reed Webb, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Seth M. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

A jury convicted Donta Lamont Campbell (Defendant) of five counts (counts 6 through 10) of sale or transportation of a controlled substance (Health & Saf. Code, § 11352, subd. (a)), one count (count 4) of possession of cocaine base for sale (*id.*, § 11351.5), and one count (count 11) of misdemeanor possession of a controlled substance without a prescription (Bus. & Prof. Code, § 4060). The jury could not reach a verdict on four counts (counts 1, 2, 3, and 5) of possession for sale of a controlled substance. The trial court declared a mistrial on those counts and dismissed them on the prosecution's motion.

After Defendant admitted he had seven prior convictions and prison terms within the meaning of Penal Code section 667.5, subdivision (b), the trial court sentenced him to a total of 11 years in prison.[1]

We affirm. Defendant does not challenge the jury verdicts on counts 6 through 10 and 11. He challenges his conviction on count 4, for possession for sale of cocaine base, on the ground the trial court erred by restricting his trial counsel's cross-examination of two police officers, one of whom testified as an expert witness. In part I. of the Discussion section, we conclude the trial court did not err in restricting cross-examination of the nonexpert, the desired testimony came into evidence through other means, and any error in restricting cross-examination of the expert witness was harmless.

In part II. of the Discussion section, we conclude Defendant's trial counsel was not ineffective for failing to assert the hearsay exception for statements against penal

[1] The sentence was calculated as follows: four years on the count of possession for sale of cocaine base, 16 months consecutive on the count of transportation of cocaine base (execution of sentence was stayed under Penal Code section 654), four years concurrent on each of the four other transportation counts, six months concurrent on the misdemeanor possession count, and one year consecutive for each of the seven prior prison terms.

interest. In part III. of the Discussion section, we conclude the trial court considered the appropriate factors and did not err by imposing the midterm sentence on count 4. Finally, in part IV. of the Discussion section, we conclude Defendant knowingly and intelligently waived his rights to a trial, to confront witnesses, and to remain silent on the prior conviction allegations and affirm the true findings on those allegations.

FACTS

We view the evidence in the light most favorable to the verdict and resolve all conflicts in its favor. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Barnes* (1986) 42 Cal.3d 284, 303.)

I.

Search and Arrest

On the night of February 15, 2012, Garden Grove Police Officer Bryan Meers was on patrol near the intersection of Harbor Boulevard and Cardinal Avenue in the City of Garden Grove. About 11:30 p.m., he saw a 1997 Chevrolet Suburban make a sudden lane change in front of another vehicle, causing the other driver to brake. Officer Meers stopped the Suburban for making an unsafe lane change. Defendant was driving the Suburban, a man named Huberto Villa was in the front passenger seat, and a woman named Anita Andrews was in the backseat behind Defendant.

Defendant consented to a search of his vehicle. As Officer Meers searched the center console, he noticed the bottom was loose and could be removed. He lifted the bottom of the center console and discovered a secret compartment in which he found a cache of drugs and drug paraphernalia. In the compartment, Officer Meers found a glass pipe with a bulbous end, commonly used to smoke methamphetamine; a black mesh zip-up case containing a small electronic scale; two bags of unused hypodermic needles; 426 milligrams of hydrocodone tablets; 257 milligrams of oxycodone tablets; "[c]hunks

of white solids, net weight of 12.761 grams containing cocaine base"; 448 milligrams of methamphetamine; 566 milligrams of heroin; and two square pieces of foil.

During the search of the vehicle, Officer Meers also found Defendant's wallet, which held $563 in cash and, on the floorboard under the driver's seat, a cell phone. Defendant wore a Bluetooth headset linked to the cell phone. The phone rang repeatedly throughout the search. Later, text messages were found on the cell phone. These messages included: "when you see Jennifer, tell her I made 90 off the gram and thanks"; "Richie needs a 40"; and "this NNT connected a guy, came and said he didn't feel . . . that black you gave him, you know him from Motel 6. You got his number. Call him. I forgot. It was a week ago. Let me know if you're in trouble." Other messages included: "I still have enough black to last, but I'm wondering if . . . can I get an advance Tammy" (with dollar signs afterwards) and "can I have an 80" (with a dollar sign afterwards). "Black" means heroin.

The vehicle's occupants did not have contraband on their persons. Villa and Andrews showed signs of being under the influence of drugs.

After finding the drugs, Officer Meers called for assistance from Master Officer Robert Campbell, who had special training and experience regarding narcotics sales. When Officer Campbell arrived, Officer Meers showed him what was found in the secret compartment of the vehicle.

The entire police encounter, including statements made by Andrews and Villa and the conversation between Officer Meers and Officer Campbell, was audio and video recorded. Some portions of the digital video recording (DVR) of the encounter were played to the jury during trial, and the entire DVR was received in evidence.

Officer Meers arrested Defendant and read him his rights under *Miranda v. Arizona* (1966) 384 U.S. 436. After agreeing to speak to Officer Meers, Defendant said he was aware of the drugs and paraphernalia in the center console of his vehicle and thought he had "about an eight ball" of cocaine base. Defendant denied selling drugs,

admitted he was an addict, and claimed the drugs found in the center console were for his personal use. Defendant had no response when Meers asked him why an addict would need a scale and 26 syringes.

II.

Expert Testimony

At trial, Officer Campbell testified that a single dose of cocaine base is 0.1 gram and that an "eight ball" is 3.5 grams. Thus, the 12.761 grams of cocaine base that Defendant had was more than three eight balls and equaled 127 doses, an amount inconsistent with personal use. The cocaine base found in the Suburban was so big that when Officer Campbell first saw it, he exclaimed, "holy shit, dude." Based on the amount of cocaine base, the presence of the scale, the hidden compartment in Defendant's vehicle, the text messages, the multiple types of controlled substances, and the large amount of cash, Officer Campbell concluded Defendant possessed the drugs for sale.

Based on a hypothetical mirroring the facts of this case, Officer Campbell testified, in his opinion, the drugs found in the vehicle were possessed for sale and the person driving the vehicle was a drug dealer. During cross-examination, Officer Campbell testified his opinion was not affected by the lack of "pay/owe" sheets and empty baggies, by the fact Villa and Andrews appeared to be under the influence of drugs, or by the possibility they could have pooled their resources with Defendant to buy the drugs found in the vehicle.

III.

Defendant's Testimony

Defendant testified at trial. He admitted the methamphetamine, heroin, and prescription medication found in the vehicle were his, admitted he did not have a prescription for the medication, but denied the cocaine base was his. He testified that, earlier in the day on which he was arrested, he drove Villa to a house and waited in the

car while Villa went inside to buy cocaine base. Defendant never saw the cocaine base but "assumed it was [an] eight ball." He saw Villa stuff a black bag with something and put the bag in the center console.

Defendant had been driving to a motel where Villa was staying when Officer Meers stopped him. When asked why he did not unload his drugs at his house where they had stopped for a while before the arrest, Defendant testified: "I carry whatever is mines [*sic*], I keep them with me at all times. I don't keep drugs with my household." Defendant testified the scale found in the vehicle was his, while the bags of syringes belonged to Villa.

Defendant testified the cell phone with the text messages was his, but he did not know about the text messages, except for one from his daughter. He claimed she had sent a message asking "can I have $80," not "can I have an 80."

DISCUSSION

I.

Any Error in Restricting Cross-examination of Officer Meers and Officer Campbell Was Harmless.

Defendant argues the trial court prejudicially erred by ruling his trial counsel could not (1) cross-examine Officer Meers about statements made to him by Villa and Andrews and (2) cross-examine Officer Campbell about statements made to him by Officer Meers and whether Officer Campbell considered those statements in reaching his conclusion that Defendant possessed the cocaine base for sale.

We review trial court rulings on the admissibility of evidence, including hearsay determinations and rulings on the scope of expert witness examination, under the abuse of discretion standard. (*People v. Waidla* (2000) 22 Cal.4th 690, 725; *People v. Rowland* (1992) 4 Cal.4th 238, 266.)

A. *Background*

Before cross-examining Officer Meers, defense counsel represented she intended to question Officer Meers about his observation that Villa and Andrews appeared to be under the influence and to ask whether he conveyed his observation to Officer Campbell. Defense counsel argued this testimony would be relevant to Officer Campbell's opinion that Defendant possessed the cocaine base for sale. Defense counsel also represented she intended to question Officer Meers about statements made to him by Villa and Andrew. Counsel argued those statements would not be hearsay because they would not be offered for the truth of the matter asserted but to establish the foundation for Officer Meers's opinion that Villa and Andrews were under the influence ("that they were [Heath and Safety Code section] 11550"). The court ruled that any statements made by Villa and Andrews would be inadmissible hearsay.

After some discussion about hearsay exceptions, defense counsel stated: "It is my belief that [Officer Meers] was made aware by the back passenger, Ms. Andrews, that the three of them had gone and just purchased cocaine base within a short period of time of them being stopped." Defense counsel argued it was necessary to question Officer Meers about statements made by Andrews to lay the foundation for cross-examining Officer Campbell about the basis for his opinion. The prosecutor asserted that the statement attributed to Andrews did not appear in the transcript of the DVR of the encounter. The trial court ruled, "as far as [Officer Meers] testifying to any hearsay statements of the passengers or any statements by the passengers, . . . the court considers those hearsay."

Later, during cross-examination of Officer Campbell, defense counsel asked him whether he had been told by Officer Meers that Villa and Andrews "were 11550." Officer Campbell answered, "[y]es." Defense counsel next asked whether Officer Meers "also let you know that the other people in the vehicle had talked to him about rock cocaine." The trial court sustained a hearsay objection. In an ensuing

chambers conference, defense counsel explained she intended to elicit testimony from Officer Campbell that Officer Meers had told him, "they both already talked to me about being 115[50]. The chick [(Andrews)] said she just picked up a rock about three hours ago." Defense counsel argued she was not offering the testimony for its truth, but "to ask this officer, based on his training and experience, if that would change his opinion in regards to this case if he knew that the passenger in the vehicle had just purchased rock cocaine earlier that night." The trial court ruled such testimony would be inadmissible double hearsay.

Defense counsel's last question in cross-examining Officer Campbell was, "[i]f you learned that the drugs belonged—that the cocaine might belong to somebody else, would that change your opinion?" The trial court sustained the prosecutor's objection of "[i]mproper hypothetical[, a]ssumes facts not in evidence."

B. *Hearsay Exceptions*

Defendant acknowledges the statements made by Villa and Andrews to Officer Meers—whether elicited through cross-examination of Officer Meers or Officer Campbell—were hearsay. Defendant acknowledges too that "[t]he court correctly analyzed that if Officer Campbell were asked whether Meers told him about what the passengers had said the question would call for double hearsay." Defendant argues the statements made to Officer Meers by Villa and Andrews, and statements made to Officer Campbell by Officer Meers, come within exceptions to the hearsay rule.

1. *Hearsay Exception for Statements Against Penal Interest*

Defendant argues statements made to Officer Meers by Villa and Andrews that they had recently bought and used cocaine were admissible under the hearsay exception for statements made against penal interest. Evidence Code section 1230 provides, in part: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as

a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability . . . ."

As Evidence Code section 1230 states, the declarant must be unavailable as a witness for the hearsay exception to apply. (*People v. Duarte* (2000) 24 Cal.4th 603, 610.) The term "'unavailable as a witness'" means the declarant is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).) "Reasonable diligence, often called 'due diligence' in case law, '"connotes persevering application, untiring efforts in good earnest, efforts of a substantial character."'" (*People v. Cogswell* (2010) 48 Cal.4th 467, 477.)

Defendant cites nothing in the record to suggest Villa and Andrews were unavailable as witnesses or defense counsel exercised reasonable diligence to procure their attendance at trial. Defendant does not even respond to the Attorney General's argument that his trial counsel failed to establish that Villa and Andrews were unavailable as witnesses. Thus, we conclude, the trial court did not err in restricting cross-examination of Officer Meers.

Nonetheless, all statements made by Officer Meers, Villa, and Andrews came into evidence through other means. The entire police encounter was recorded and the DVR was received in evidence. The jury could hear what Villa and Andrews said to Officer Meers and everything Officer Meers said to Officer Campbell. In addition, on cross-examination, Officer Meers testified he "knew for certain" that Villa was under the influence but "was [a] bit hesitant to make the confirmation on . . . Andrews." Officer Meers testified he gave Officer Campbell "the lowdown" on everything Officer Meers had seen that evening, including the fact Villa and Campbell were under the influence. During cross-examination, Officer Campbell testified Officer Meers had told him that other people in the car were under the influence. Officer Campbell testified

Villa and Andrews appeared to be under the influence of drugs, and heavy drug users could pool their money to buy large quantities of drugs for personal use. Defense counsel asked Officer Campbell whether his opinion was affected by the fact Villa and Andrews were under the influence, and Officer Campbell answered no.

2. *Cross-examination of Expert Witness*

Defendant argues his trial counsel should have been permitted to cross-examine Officer Campbell about what Officer Meers had told him because "[t]he out-of-court declarations of the passengers were admissible for the nonhearsay purpose of evaluating the factual basis and reasoning the expert used in forming his opinion."

For purposes of analysis, we will assume defense counsel should have been permitted to cross-examine Officer Campbell by asking him whether, in formulating his opinion the cocaine base was possessed for sale, he had considered Officer Meers's statement, as represented by defense counsel, that "[t]he chick said she just picked up a rock about three hours ago." Officer Campbell testified his opinions were based entirely on "what Officer Meers said." The rule is "[a]n expert witness may be cross-examined as to 'the matter upon which his or her opinion is based and the reasons for his or her opinion.' [Citation.] The scope of cross-examination permitted under [Evidence Code] section 721 is broad, and includes examination aimed at determining whether the expert sufficiently took into account matters arguably inconsistent with the expert's conclusion." (*People v. Ledesma* (2006) 39 Cal.4th 641, 695.)

Any error in restricting cross-examination of Officer Campbell was harmless under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, or the standard of *Chapman v. California* (1967) 386 U.S. 18. Under the *Watson* standard, "[t]he reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error." (*People v. Partida* (2005) 37 Cal.4th 428, 439.) Under the *Chapman* test, the error is harmless when it appears

"beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California*, *supra*, at p. 24.)

It is beyond a reasonable doubt the restriction on cross-examination of Officer Campbell did not contribute to the verdict on count 4. As we have mentioned, the DVR of the police encounter was received in evidence. The recording shows the colloquy between Officer Meers and Officer Campbell was quite different from what was represented by defense counsel in making the offer of proof and as argued by Defendant's appellate counsel. Officer Meers did tell Officer Campbell, "the chick said she just picked up a rock down in Santa Ana about three hours ago." But, when Officer Campbell asked where that rock was, Officer Meers replied, "she already smoked it." The DVR in evidence reveals that Andrews had told Officer Meers she obtained a little piece of crack cocaine earlier that day in Santa Ana and had smoked it about two hours previously. Thus, the DVR establishes the cocaine rock purchased and smoked by Andrews was not the cocaine base found in Defendant's vehicle, and the desired cross-examination could not and would not have undermined Officer Campbell's opinion.

Further, Officer Campbell testified, in his opinion, the cocaine base was possessed for sale "just by quantity alone." In response to a hypothetical, Officer Campbell opined the driver of the vehicle (Defendant) was a drug dealer, but Officer Campbell's testimony did not foreclose the jury from deciding Villa or Andrews had purchased the cocaine base and possessed it for sale. As to who possessed the cocaine base, the jury heard and considered Defendant's testimony claiming Villa purchased the cocaine base and Defendant never saw the cocaine base and did not know the quantity purchased. In reaching its verdict of guilt on count 4, the jury, of necessity, disbelieved Defendant.

As Defendant argues, the jury did pay close attention to Officer Campbell's testimony and, during deliberations, asked for it to be read back. The jury's

communications in that regard show harmless error. The jury's readback note stated: "We would like a read-back of Officer Campbell's testimony regarding the drug quantity, with respect to usage. We'd like to hear the comments on personal usage v. selling, his identification of the cocaine, and his conclusions, as well as the text messages that he considered in forming his expert opinion." The note shows the jury was concerned with the quantity of drugs and whether the quantity supported the conclusion of possession for sale. Later during deliberations, the jury announced it could not reach a verdict on counts 1, 2, 3, and 5 (possession for sale): "We are at an impasse as to whether it was mere possession or possession for sales involved on these counts." The jury's note stated the jury already had reached a verdict on count 4, possession for sale of cocaine base.

The jury's notes demonstrate, in reaching the verdict of guilt on count 4, the jury was persuaded by the extremely large quantity of cocaine base and simply disbelieved Defendant's testimony that Villa had purchased that cocaine base. The jury was unable to reach a verdict on the other possession for sale counts. Had the jury believed Defendant, it would have acquitted him of count 4. Defense counsel was able to elicit from Officer Campbell testimony that it was possible for heavy drug users to pool money to purchase large quantities of drugs for personal use; however, the jury verdict shows it found that did not happen in this case. The cocaine base was found in a hidden compartment of Defendant's vehicle, along with methamphetamine, heroin, oxycodone, hydrocodone, 26 syringes, a scale, a mesh case, and unused squares of foil. Defendant's cell phone, to which Defendant was connected by Bluetooth, had text messages appearing to ask about drug sales, and Defendant had $563 in his wallet. The DVR of the police encounter shows Andrews did not tell Officer Meers she had purchased the cocaine base that was the subject of count 4. In light of this evidence, it is beyond a reasonable doubt the restriction in cross-examination of Officer Campbell did not contribute to the verdict on count 4.

II.

There Was No Ineffective Assistance of Counsel.

Defendant argues his trial counsel was ineffective by failing to assert the hearsay exception for statements made against penal interest as to statements made by Villa and Andrews to Officer Meers. To prevail on a claim of ineffective assistance of counsel, the defendant must prove (1) his or her attorney's representation was deficient in that it fell below an objective standard of reasonableness under prevailing professional standards; and (2) his or her attorney's deficient representation subjected him or her to prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Cain* (1995) 10 Cal.4th 1, 28.)

"'When a defendant makes an ineffectiveness claim on appeal, the appellate court must look to see if the record contains any explanation for the challenged aspects of representation. If the record sheds no light on why counsel acted or failed to act in the manner challenged, "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation" [citation], the contention must be rejected.' [Citation.] A reviewing court will not second-guess trial counsel's reasonable tactical decisions. [Citation.]" (*People v. Kelly* (1992) 1 Cal.4th 495, 520.)

Although the record sheds no light on why Defendant's trial counsel did not assert the hearsay exception for statements against penal interest, there could be several satisfactory explanations. Defense counsel might have known hearsay could not be asserted in good faith because Villa and Andrews were indeed available and could be subpoenaed to testify, might not have been able to show unavailability, or might have determined that Villa and Andrews—both heavy drug users—might not have made persuasive witnesses or might have offered unfavorable testimony. Most importantly, defense counsel did not have to assert the hearsay exception because the entirety of the police encounter, including Andrews's statements to Officer Meers and Officer Meers's

conversation with Officer Campbell, was recorded and the DVR was received in evidence. The jury could watch and hear the entire DVR. These are reasonable, tactical reasons which we will not second-guess.

For similar reasons, we conclude Defendant suffered no prejudice. Prejudice means a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington, supra,* 466 U.S. at p. 694.) As we have explained, and emphasize again, the jury could watch and hear the DVR of the police encounter, including Andrews's statements to Officer Meers and the conversation between Officer Meers and Officer Campbell. The DVR does not support Defendant's assertion that Andrews or Villa purchased the cocaine base found in Defendant's vehicle.

III.

The Trial Court Did Not Err by Imposing the Midterm Sentence on Count 4.

The crime of possession for sale of cocaine base carries a prison term of three, four, or five years. (Health & Saf. Code, § 11351.5.) On count 4, the base term, the trial court imposed the midterm sentence of four years. Defendant argues the trial court was predisposed to imposing that term and abused its discretion by failing to consider relevant sentencing factors and by failing to state its sentencing reasons on the record.

Defendant's trial counsel did not object to the length of sentence imposed. Because counsel failed to object, the claim of sentencing error is deemed waived. (*People v. Scott* (1994) 9 Cal.4th 331, 353 ["the waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices"].)

Defendant does not make an ineffective assistance of counsel claim; nonetheless, we address the sentencing issue on the merits to forestall such a claim in the

future. (See *People v. Butler* (2003) 31 Cal.4th 1119, 1128.) We conclude any failure to object to the trial court's sentencing choice on count 4 did not subject Defendant to prejudice. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 687.)

Defendant's contention the trial court was predisposed to imposing the middle term sentence is based on several statements the court made during a pretrial discussion about a plea offer. The prosecutor explained that Defendant had been offered a plea deal in which he would receive a three-year sentence on count 4 and the prior conviction allegations would be stricken. To ensure he was fully informed in making a decision, the trial court advised Defendant that, historically, the trial court imposed the middle term. The court explained to Defendant: "So I don't know what the outcome of this case is going to be. I have no idea. I don't have a horse in this race. I just know that . . . if and when it comes time to sentencing you, if I do have to sentence you, obviously I have to take into account everything that happens. Listen to evidence, I have to hear from your attorney, probation and sentencing report, you can talk to me, tell me things. I bring in a lot of things. I don't come to the table with any preconceived idea of what, if anything, you're going to get at the end of the case. [¶] I can tell you, only because it's pretty much standard with all judges here in Orange County, and you can ask everybody who's tried a case in my courtroom—I'm on probably about 80 felony trials I've done. . . . I can tell you after trial, I don't think I've ever given anybody low term. We start at mid term. Okay?" To give Defendant an idea of what he might face if he turned down the offer, the trial court calculated a total sentence of 10 years, based on a middle term of four years on count 4 and one year for each of six prior conviction allegations (the trial court mistakenly omitted one of the seven prior conviction allegations).

The trial court's statements do not show, as Defendant argues, that the court, as a matter of course, always imposed the midterm sentence without consideration of sentencing factors and exercising discretion. The trial court was simply explaining that, historically, it had never imposed a low term. The trial court made clear that at the

time of sentencing, it would "take into account everything that happens," and consider the evidence, counsel's statements, the probation and sentencing report, and anything Defendant had to say. The court confirmed it had no "preconceived idea[s]" about sentencing.

The record establishes, at the time of sentencing, the trial court considered relevant factors and appropriately exercised its discretion. A factor the trial court may consider in aggravation is "[t]he defendant's prior convictions as an adult . . . are numerous or of increasing seriousness." (Cal. Rules of Court, rule 4.421(b)(2).) "'[R]ecidivism . . . is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence.'" (*People v. Black* (2007) 41 Cal.4th 799, 818.) Here, the trial court considered the parties' sentencing briefs and the probation and sentencing report, which showed Defendant has had a lengthy history with law enforcement. The court noted, "the probation and sentencing report is rather clear, not only in your long term history, but in your multiple failed attempts at the programs."

To the extent the trial court did not fully and adequately state its reasons for imposing the middle term sentence, any error was harmless. (*People v. Davis* (1995) 10 Cal.4th 463, 552.) Defendant's recidivism fully justified imposition of the midterm sentence on count 4. Remand would be an idle act because it is not reasonably probable the trial court would impose a different sentence. (*People v. Coelho* (2001) 89 Cal.App.4th 861, 889.)

IV.

Defendant's Admission of the Prior Conviction Allegations Was Voluntary and Intelligent.

The amended information included seven separate allegations pursuant to Penal Code section 667.5, subdivision (b) that Defendant had been convicted of a felony for which he had served a prison term. Defendant argues his admission of those allegations must be set aside because the trial court's advisement of his rights was

incomplete and, therefore, he did not knowingly and voluntarily waive them. We conclude Defendant's waiver was voluntary and intelligent under all of the circumstances.

"[B]efore accepting a criminal defendant's admission of a prior conviction, the trial court must advise the defendant and obtain waivers of (1) the right to a trial to determine the fact of the prior conviction, (2) the right to remain silent, and (3) the right to confront adverse witnesses. [Citation.] Proper advisement and waivers of these rights in the record establish a defendant's voluntary and intelligent admission of the prior conviction. [Citations.]" (*People v. Mosby* (2004) 33 Cal.4th 353, 356.) If the defendant admits a prior conviction after being advised of and waiving only the right to trial, without expressly waiving the right to remain silent and the right to confront witnesses, the admission may be deemed to have been voluntary and intelligent if the totality of the circumstances support such a conclusion. (*Ibid*.) The reviewing court must determine "whether 'the record affirmatively shows that [the admission] is voluntary and intelligent under the *totality of the circumstances*.'" (*Id.* at p. 360.) "[I]f the transcript does not reveal complete advisements and waivers, the reviewing court must examine the record of 'the entire proceeding' to assess whether the defendant's admission of the prior conviction was intelligent and voluntary in light of the totality of circumstances." (*Id.* at p. 361.)

We have reviewed the transcript and the entire record and, based on our review, conclude Defendant's admission of the prior conviction allegations was voluntary and intelligent. At the start of trial, those allegations were bifurcated from the substantive charges. After the jury had reached a verdict, but before the verdicts were read and the jury discharged, the following discussion regarding adjudication of the prior conviction allegations was held:

"The Court: It's been alleged you suffered six prior convictions under Penal Code section 667.5(b). Those have to be proved up. They have to be determined

to be true and accurate and valid. Okay? [¶] Now, the jury can make that determination. And what would happen is [the prosecutor] would put on evidence, [defense counsel] could then challenge that evidence and then I would give them jury instructions and they would go back and deliberate. That's one way of doing it. [¶] The second way of doing it is I dismiss—when we're finished and done with all of this, if I end up dismissing the jury, I dismiss the jury and then we can do that whole process but it can be done [by] me. [The prosecutor] presents the evidence, [defense counsel] challenges it, and I make a decision. We can do that immediately or we can do that at the time of your sentencing, . . . which . . . probably would be in 4 to 6 weeks, if you're found guilty. [¶] Or, lastly, you can just admit that those are yours and you can just say, yeah, I admit I suffered those convictions then we don't have to put any evidence on or anything of that nature. [¶] Those are your choices. Do you understand your choices, sir?

"The defendant: Yes, sir.

"The Court: Do you have any questions you want to ask me about those choices?

"The defendant: No, sir.

"The Court: If, by chance, they do find you guilty of a felony count, which of those choices would you like to do sir? [¶] . . . [¶]

"The defendant: I would like to have you decide, sir.

"The Court: And does counsel join in that—

"[Defense counsel]: I do.

"The Court: —Discussion and waiver?

"[Defense counsel]: I do."

At the sentencing hearing, held about seven weeks later, defense counsel announced that Defendant wished to admit the prior conviction allegations. The trial court then took Defendant's admission of each of the seven prior conviction allegations.

The trial court expressly and unequivocally advised Defendant of his right to a trial—either a jury trial or a bench trial—to determine the fact of the prior conviction allegations. Defendant stated he understood he had that right. He argues the trial court's advisement was incomplete because it did not inform him of his right to remain silent and his right to confront adverse witnesses. Although the trial court did not expressly tell Defendant he had those rights, the court did tell him he would be able to challenge evidence put on by the prosecutor. Defendant had just sat through a trial, and "because he had, through counsel, confronted witnesses at that immediately concluded trial, he would have understood that at a trial he had the right of confrontation." (*People v. Mosby, supra*, 33 Cal.4th at p. 364.) Defendant was present during voir dire when his counsel explained to the jury venire: "He has the right not to testify. What the law says is you're not to regard that in any way, whether he testifies or doesn't testify. We don't get bonus points by taking the stand and we don't lose points by not taking the stand." (Cf. *People v. Hinton* (2006) 37 Cal.4th 839, 875, fn. 12 [valid waiver when the defendant was present in court when the trial court explained to the jury venire that if the defendant were found guilty, the jury would be asked to determine whether special circumstance allegations were true].)

A defendant's prior experience with the criminal justice system is relevant to the question whether the defendant voluntarily and intelligently waived constitutional rights. (*People v. Mosby, supra*, 33 Cal.4th at p. 365.) Defendant has had a lengthy and extensive history with the criminal justice system. In his opening brief, Defendant represents that he "did not go to trial" in his seven prior conviction cases. He would have received full advisements before pleading guilty in those cases, and, therefore, knew he could have confronted witnesses and remained silent during a trial on the prior conviction allegations. (*People v. Mosby, supra*, at p. 365.)

DISPOSITION

The judgment is affirmed.

FYBEL, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.